(1)

Supreme Court, U.S.
FILED

No. 01- 1082 JAN 17 2002

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

WINDELL THREADGILL,

Petitioner,

v.

MOORE U.S.A., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DAVID E. LASKER
Counsel of Record
SHNEIDMAN, HAWKS & EHLKE, S.C.
Attorneys for Petitioner
217 South Hamilton Street - Suite 400
Post Office Box 2155
Madison, Wisconsin 53701-2155
(608) 257-0040

Dated: January 17, 2002

171707

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

37pp

QUESTION PRESENTED FOR REVIEW

Did the United States Equal Employment Opportunity Commission fail to provide adequate notice of Title VII's 90-day limitation on petitioner's right to sue, where it mailed the notice only to the petitioner despite the fact that his attorney of record had requested both issuance of the notice and that the attorney be sent a copy of it, where the E.E.O.C.'s normal policy is to mail a copy to the attorney, and where petitioner, therefore, reasonably expected his attorney would be sent a copy and would protect his rights?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	vi
Opinions and Orders Below	1
Statement of the Basis for Jurisdiction	1
Statute and Rule Involved in the Case	1
Statement of the Case	2
Reasons for Granting the Writ	5
I. There Is A Conflict Between The Circuits As To Whether It Is Necessary To Serve A Claimant's Attorney Of Record With A Copy Of The Notice Of Right To Sue.	5
II. The United States Court Of Appeals For The Seventh Circuit Has Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court, And It Has Done So In A Way That Conflicts With This Court's Decisions In *Irwin v. Dep't Of Veterans Affairs* And *Zipes v. Trans World Airlines, Inc.*	8

Contents

Page

A. Where Petitioner's Attorney of Record Was Not Sent a Copy of the Notice of Right to Sue, Despite Explicitly Requesting Service upon Him When He Requested Issuance of the Notice on Behalf of His Client, Where the EEOC's Normal Policy Is to Mail a Copy to the Attorney, and Where Petitioner, Therefore, Reasonably Expected That His Attorney Would Receive a Copy and Protect His Rights, the 90-day Period of Limitations under 42 U.S.C. § 2000e-5(f)(1) Should Be Deemed to Commence When the Attorney Gained Actual Knowledge the Notice Had Been Issued. 12

B. Principles of Equitable Tolling Extend to the Facts of this Case, and, Therefore, the Action Was Timely Filed. 14

Conclusion 17

TABLE OF CITED AUTHORITIES

Page

Cases:

Baldwin County Welcome Center v. Brown,
466 U.S. 147 (1984) 16

Ball v. Abbott Advertising, Inc.,
864 F.2d 419 (6th Cir. 1988) 5, 6

Banks v. Rockwell Int'l. North American Aircraft Operations,
855 F.2d 324 (6th Cir. 1988) 5

Crown, Cork & Seal Co. v. Parker,
462 U.S. 345 (1983) 14

Irwin v. Dep't of Veterans Affairs,
498 U.S. 89 (1990) ..... *passim*

Jones v. Madison Service Corp.,
744 F.2d 1309 (7th Cir. 1984) 7, 9, 10, 14

Love v. Pullman Co.,
404 U.S. 522 (1972) 11

Noe v. Ward, 754 F.2d 890 (10th Cir. 1985) 7

Saxton v. American Tel. & Tel. Co.,
10 F.3d 526 (7th Cir. 1993) 7

Cited Authorities

Page

Seitzinger v. Reading Hospital & Medical Center,
165 F.3d 236 (3d Cir. 1999) 7

Stallworth v. Wells Fargo Armored Services Corp.,
936 F.2d 522 (11th Cir. 1991) 6, 9, 12, 13, 14

Thomas v. KATV Channel 7,
692 F.2d 548 (8th Cir. 1982) 7

Zipes v. Trans World Airlines, Inc.,
455 U.S. 385 (1982) 8, 11, 14

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 4

42 U.S.C. § 2000 *et seq.* 4

42 U.S.C. § 2000e-5(f)(1) 1, 5, 6, 7, 8, 12

42 U.S.C. § 2000e-16(c) 8

Rule:

Fed. R. Civ. P. 5(b) 2, 9, 13

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Seventh Circuit Decided October 19, 2001 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court For The Western District Of Wisconsin Entered December 11, 2000 ..... 7a

OPINIONS AND ORDERS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit, *Threadgill v. Moore U.S.A., Inc.*, No. 01-1051 (7th Cir. Oct. 19, 2001), is reported at 269 F.3d 848, and is reprinted at App. 1a. The Memorandum and Order of the United States District Court for the Western District of Wisconsin, entered December 11, 2000, is unreported but is reprinted at App. 7a.

STATEMENT OF THE BASIS FOR JURISDICTION

The Supreme Court has jurisdiction to review cases from the courts of appeals under 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED IN THE CASE

42 U.S.C. § 2000e-5(f)(1), in pertinent part, states as follows:

> [I]f within one hundred and eighty days from the filing of such charge . . . , the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved. . . .

Fed. R. Civ. P. 5(b), in pertinent part, states as follows:

> Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney . . . shall be made by delivering a copy to the attorney . . . or by mailing it to the attorney . . . at the attorney's . . . last known address. . . . Service by mail is complete upon mailing.

STATEMENT OF THE CASE

Petitioner Windell Threadgill worked at the Monroe, Wisconsin manufacturing plant of Moore U.S.A., Inc., from May 23, 1983 until September 22, 1997. App. 2a. In January 1998, Threadgill filed a complaint with the Wisconsin Department of Workforce Development and the United States Equal Employment Opportunity Commission ("EEOC"), alleging he had been harassed, intimidated, denied promotional opportunities, and terminated from his employment on the basis of his African-American race. App. 2a.

While the administrative proceedings were pending, on October 11, 1999, David E. Lasker, Threadgill's attorney, sent to the EEOC's Milwaukee District Office a written request that the EEOC issue a notice of right to sue. App. 2a; District Court Docket No. 15 ("R.15") at Ex. 1. In the letter, Lasker reiterated that he was the attorney of record for Threadgill and said the request for the notice was being made by him on behalf of his client. *Id.* He also said, "Please be sure to send a copy of the notice to the undersigned at this address." *Id.*

On November 18, 1999, the EEOC mailed the notice to Threadgill, who received it soon thereafter. App. 2a. Lasker never received a copy of the notice from the EEOC, and it appears from the face of the notice itself that none was ever sent to him. App. 2a; R.15 at Ex. 2.

Although Threadgill had a high school education, it was difficult for him to read and understand legal documents. R.15. at ¶2. He had no prior experience in legal matters, and it was difficult for him to understand the technical legalities related to his claims. *Id.* at ¶¶2-3. He relied on his attorney to explain things to him and to handle legal concerns on his behalf. *Id.* at ¶3. Based upon his receipt of the copy of Lasker's October 11, 1999 letter, it was Threadgill's understanding that his lawyer was to receive a copy of the notice. *Id.* at ¶¶4-5. He placed the notice with his other papers regarding the case and awaited further developments. *Id.* at ¶5.

On June 16, 2000, well past the 90-day limit for filing suit, while Threadgill and Lasker were conversing by telephone, Lasker learned for the first time of the existence of the notice. App. 2a; R.14 at ¶3. At Lasker's request, Threadgill immediately faxed a copy of the notice to him and sent a photocopy of it to him by mail. R.14 at ¶4.

When Threadgill originally received the notice, he had no idea that he would be the only one receiving the document. R.15 at ¶9. No other document had been received by Threadgill regarding his case without a copy of it also being sent to his attorney. *Id.* Prior to receiving the notice, anytime Threadgill received a document either from the Equal Rights Division of the Wisconsin Department of Workforce Development or the EEOC, Lasker also received a copy. *Id.*

By the time he received the notice, Threadgill had come to rely upon the fact that his lawyer always got a copy of anything that came to him from those agencies. *Id.*

It is the policy, and the usual practice, of the Milwaukee District Office of the EEOC to send a copy of the notice to the attorney of record for the claimant. R.14 at Ex. 1. The EEOC Compliance Manual provides that a copy of the notice should be sent to the claimant's attorney. *See infra* at 13.

The instant action was commenced on September 11, 2000, less than 90 days after Lasker first gained knowledge of the issuance of the notice. The district court had jurisdiction pursuant to 28 U.S.C. § 1331, regarding federal questions arising under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e *et seq.*). After giving the parties opportunity to present all relevant material, the district court ordered on December 11, 2000 that Moore's motion for summary judgment be granted and that Threadgill's complaint be dismissed as time-barred with prejudice and costs. App. 3a. Threadgill appealed, and on October 19, 2001, the United States Court of Appeals for the Seventh Circuit entered its opinion affirming the judgment of the district court. This Petition for a Writ of Certiorari has been timely filed.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT BETWEEN THE CIRCUITS AS TO WHETHER IT IS NECESSARY TO SERVE A CLAIMANT'S ATTORNEY OF RECORD WITH A COPY OF THE NOTICE OF RIGHT TO SUE.

This case turns upon the ques on of whether 42 U.S.C. § 2000e-5(f)(1) permits the EEOC to ignore the attorney of record for a party and serve only the party, personally, with the important notice that the right to sue will expire if no action is taken within 90 days. Is it necessary to include the party's lawyer "in the loop" to ensure that the represented party is not denied access to the courts?

The Seventh Circuit in *Threadgill v. Moore U. S. A., Inc.*, 269 F.3d 848 (7th Cir. 2001), answered "no" to that question. App. 6a. The court stated plainly that "the attorney's receipt is irrelevant." App. 4a. The same stance has been taken by the Sixth Circuit, which "has flatly rejected the argument that the failure by the EEOC to copy counsel on a right-to-sue letter prevents the ninety-day period from running." *Ball v. Abbott Advertising, Inc.*, 864 F.2d 419, 421 (6th Cir. 1988), *citing Banks v. Rockwell Int'l North American Aircraft Operations*, 855 F.2d 324, 326 (6th Cir. 1988).[1]

1. The ruling in *Ball*, on the basis of the decision in *Banks*, evidences a lack of explicit treatment of the issue by the Sixth Circuit. In *Banks*, the court actually did not address the issue for which *Banks* is cited as authority in *Ball*. In fact, in *Banks* the court specifically noted "appellant's argument that the *EEOC Compliance Manual* requires the Commission to send counsel a copy of the notice of right to sue was not presented to the district court nor did the district court consider such contention." 855 F.2d at 326. Because appellant's brief "[did] not squarely present the argument pressed . . . on appeal," the court declined to review the argument or decide the issue. *Id.*

The Eleventh Circuit takes a different view from that of the Sixth and Seventh Circuits on the question of the need to serve the complainant's attorney. In *Stallworth v. Wells Fargo Armored Services Corp.*, 936 F.2d 522 (11th Cir. 1991), the court vacated the district court's dismissal of Stallworth's Title VII claim on timeliness grounds, where the EEOC did not send a copy of the right-to-sue letter to Stallworth's attorney. The court said:

> We conclude that the primary fault for the failed delivery in this case rests upon the EEOC because of its failure to mail a copy of the right-to-sue letter to Stallworth's attorney. Not only was the EEOC expressly requested to mail a copy to the attorney, but also the EEOC Compliance Manual provides that a copy of the right-to-sue letter should be sent to the claimant's attorney.

936 F.2d at 525 (footnotes omitted).[2] The ruling by the Eleventh Circuit on the issue raised in the case at bar cannot be reconciled with the handling of the issue by the Seventh Circuit in *Threadgill* and the Sixth Circuit in *Ball*.

Threadgill, *Ball*, and *Stallworth* are the only cases petitioner has been able to locate among all the circuits in which the issue of timeliness under 42 U.S.C. § 2000e-5(f)(1)

2. In *Stallworth*, the plaintiff also did not personally receive the notice, due to various address problems involving no fault of her own. 936 F.2d at 525. The law in the Eleventh Circuit requires the claimant to assume "some minimum responsibility" to ensure receipt of the notice of right to sue. *Id.* at 524. The court found that the most significant action Stallworth took in successfully carrying her minimum burden was "[to request] the EEOC to mail a copy of the right-to-sue letter to her attorney at *his* address." *Id.* (emphasis added).

arose where the claimant's attorney of record was not served with a copy of the notice. All other reported cases involve either (1) service of the notice upon an unrepresented claimant, (2) service only upon the claimant's attorney,[3] or (3) service upon both the claimant and the attorney.[4] The latter situation, where both attorney and client have been served, is the most usual fact situation in the cases involving issues of timeliness under 42 U.S.C. § 2000e-5(f)(1). Whichever of the three permutations may be involved, none of the other reported cases applies to this case, where petitioner's attorney was not served and was simply ignored, without the client's knowledge or the attorney's knowledge, under circumstances in which the client was induced to believe a copy would be sent to his attorney in order for the attorney to act to protect his rights.

---

3. *See, e.g., Jones v. Madison Service Corp.*, 744 F.2d 1390 (7th Cir. 1984).

4. *See, e.g., Seitzinger v. Reading Hospital & Medical Center*, 165 F.3d 236 (3d Cir. 1999); *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 532 n.11 (7th Cir. 1993); *Thomas v. KATV Channel 7*, 692 F.2d 548 (8th Cir. 1982); *Noe v. Ward*, 754 F.2d 890 (10th Cir. 1985).

II. THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, AND IT HAS DONE SO IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISIONS IN *IRWIN v. DEP'T OF VETERANS AFFAIRS* AND *ZIPES v. TRANS WORLD AIRLINES, INC.*

Although this Court has not examined the necessity of serving an attorney of record under 42 U.S.C. § 2000e-5(f)(1), it has ruled on the importance of serving the lawyer under similar circumstances. In *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990), the Court faced an analogous situation. A discharged federal government employee brought an employment discrimination action after she and her attorney received copies of an EEOC notification letter informing them, pursuant to 42 U.S.C. § 2000e-16(c), that the action had to be commenced within thirty (30) days of receipt of the notice. 498 U.S. at 91. The letter, which was dated March 19, 1987, was received at the attorney's office on March 23, 1987, while the attorney was out of the country, and he did not learn of it until his return on April 10, 1987. *Id.* The employee received her copy of the letter on April 7, 1987. *Id.* Her complaint was filed on May 6, 1987, 44 days after the notice was received at her attorney's office, but only 29 days after it had been received by the plaintiff. *Id.* The Court held that the complaint was untimely, because it was first received at the attorney's office more than 30 days before the action was commenced. *Id.* at 92.

The Court focused upon the importance of including the attorney in the process. 498 U.S. at 93. It referred to the

provisions of Fed. R. Civ. P. 5(b), which state, "Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court." *Id.* The Court said, "To read the term 'receipt' to mean only 'actual receipt by claimant' would render the practice of notification through counsel a meaningless exercise." *Id.* It added, "If Congress intends to depart from the common and established practice of providing notification through counsel, it must do so expressly." *Id.* The Court also noted the importance of service upon the litigant's attorney, as provided in Fed. R. Civ. P. 5(b), in order to avoid "factual disputes about when actual notice was received" and "uncertainty in an area of the law where certainty is much to be desired." *Id.*[5]

Although the facts of the case at bar are somewhat different, it is patent that an attorney's lack of receipt of the notice is a significant problem, as the Eleventh Circuit acknowledged in *Stallworth* and the Seventh Circuit failed to see in *Threadgill*. The point was underscored by Justice Stevens in *Irwin*, when he said, "Actually, notifying both the claimant and his representative makes sense . . . [because] [d]ual notification ensures that all persons concerned with the progress of the action are apprised of important developments." 49 U.S. at 101 (Stevens, J., concurring in part and dissenting in part).

In *Jones v. Madison Service Corp.*, 744 F.2d 1309 (7th Cir. 1984), the case upon which the court relied most

5. If the Court grants this Petition and decides the question presented, it would close the last major loophole of uncertainty remaining after its decision in *Irwin* and would obviate a great deal of future litigation over timeliness issues in all the circuits.

heavily in *Threadgill*, *see* App. 3a-4a, the Seventh Circuit itself realized and emphasized the importance of placing the attorney at the center of the process. In *Jones*, the court specifically acknowledged "the risk that a claimant could remain in ignorance of his rights until the time to sue had passed" if his attorney is not notified of the issuance of the notice. 744 F.2d at 1312. The court said, "This danger is not present when [the attorney receives the notice], [because the attorney is] the individual in charge of proceeding with the litigation and aware, perhaps more than the claimant, of the importance of such notice." *Id.*[6]

In addition to relying upon the decision in *Jones*, the court in *Threadgill* relied upon this Court's decision in *Irwin*. *See* App. 4a. The court rested its decision upon both precedents as authority for the rule that the 90-day limitation period starts to run when the notice is received "*either by the claimant or by the attorney representing him in the Title VII action*." App. 3a (emphasis in the original).

The "either/or" rule had been established in numerous circuits, including the Seventh Circuit, prior to this Court's decision in *Irwin*. *See, e.g.*, *Jones*. After *Irwin*, naturally, all courts refer to it as the controlling precedent for the "either/or" rule. *See* 498 U.S. at 92 (notice is "received" when delivered "to a claimant or the claimant's attorney, whichever comes first"). However, applying the "either/or" rule in the context of this case is inapposite and nonsensical; the rule was developed and (before *Threadgill* and *Ball*) applied only

6. In *Jones*, the attorney received the notice and the clients did not. 744 F.2d at 1311. Therefore, ironically, the court underscored *the significance of actual receipt of the notice by the attorney*, as a basis for affirming the district court's dismissal of the action on the grounds that it was not timely commenced. *Id.* at 1314.

in the context where the aggrieved party's attorney *received* the notice, usually in close proximity to the time it was received by the client. "Either/or" logically implies receipt by two addressees, not just one. The Court in *Irwin* would not have said "whichever comes *first*" (emphasis added) in stating the rule, had it not intended the rule to apply where *both* the attorney and client received notice.

Thus, the decision in *Irwin* is distinguishable, because the EEOC did not serve the petitioner's lawyer with notice in this case. The issue petitioner seeks to bring before the Court has never been truly or fairly decided on its merits.

The Supreme Court has issued "previous admonitions that Title VII, a remedial statute, should be construed in favor of those whom the legislation was designed to protect." *Irwin*, 498 U.S. at 102 (Stevens, J., concurring in part and dissenting in part), *citing Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397-98 (1982); *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972). The Seventh Circuit failed to do so in this case.

A. Where Petitioner's Attorney of Record Was Not Sent a Copy of the Notice of Right to Sue, Despite Explicitly Requesting Service upon Him When He Requested Issuance of the Notice on Behalf of His Client, Where the EEOC's Normal Policy Is to Mail a Copy to the Attorney, and Where Petitioner, Therefore, Reasonably Expected That His Attorney Would Receive a Copy and Protect His Rights, the 90-day Period of Limitations under 42 U.S.C. § 2000e-5(f)(1) Should Be Deemed to Commence When the Attorney Gained Actual Knowledge the Notice Had Been Issued.

Referring to 42 U.S.C. § 2000e-5(f)(1), the court in *Threadgill* acknowledged that "the statute itself does not specify who the recipient of the notice must be." App. 3a. The ambiguity in applying the statute to the facts of each case must be resolved by judicial interpretation. Proper application of the principles that underlie *Irwin* should lead to the opposite result from that reached by the Seventh Circuit in the case at bar.[7]

The statute states that "the Commission . . . shall . . . notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought. . . ." 42 U.S.C. § 2000e-5(f)(1). The question presented is whether proper notice under the statute must be given to a represented claimant's attorney, and the strong sense of the Court's decision in *Irwin* is that the answer should be in the affirmative.

---

7. The Eleventh Circuit in its decision in *Stallworth*, which is contrary to that of the Seventh Circuit in *Threadgill*, specifically noted that it deemed its decision to be consistent with this Court's decision in *Irwin*. *Stallworth*, 936 F.2d at 525 n.4.

As noted earlier, the lynchpin of the *Irwin* decision was Fed. R. Civ. P. 5(b), requiring service upon the attorney of a represented party by mail or delivery to the attorney's office. 489 U.S. at 93. Strong policy considerations support the application of Rule 5(b) in resolving ambiguity and applying the instant statute. *See id.*; *see also supra* at 8-9. For 65 years, since 1937, Rule 5(b) has stood the test of time and become the undisputed standard for all dealings with a represented party. It is appropriate to read the statute in the context of the time-honored and generally accepted rule. It is reasonable to expect all those engaged in the litigation process to abide by the rule, and the Court can take judicial notice that contacting a party through the party's counsel is at the heart of every code of professional ethics governing lawyers throughout the land.

Probably for those reasons, the published policy of the EEOC is to mail a copy to claimant's attorney. *See Stallworth*, 936 F.2d at 525, text & n.3 (§ 6.4(b) of the EEOC Compliance Manual provides that a copy of the right-to-sue letter should be sent to the claimant's attorney). *See also* Appendix of Plaintiff-Appellant (petitioner herein) in the court below, at A25 (when notice of right to sue is given by the Civil Rights Division of the United States Department of Justice, the *only* notice sent to the represented claimant is given by addressing it to him *in care of his attorney at his attorney's address*).

Other important policy considerations also support the conclusion that service upon the attorney is required. A decision in favor of the petitioner would encourage claimants to trust the legal system and their lawyers. A contrary decision, as in the opinion of the Seventh Circuit in this case, has the opposite effect. It sends the message that the system is not to be trusted and that the EEOC in

particular cannot be relied upon to follow its own policies. It says that the EEOC, a government agency, can ignore a party's legal counsel to the detriment of that party.

If the decision in *Threadgill* stands, it would cause litigants to worry that they must micro-manage their cases even though they are supposed to be in the capable hands of qualified legal counsel. In that way, it would impede the attorney-client relationship and, ultimately, could discourage litigants from seeking legal counsel. Yet, it is in the best interests of all concerned to have legal representation for parties seeking redress.

B. Principles of Equitable Tolling Extend to the Facts of this Case, and, Therefore, the Action Was Timely Filed.

The statutory time limits applicable to lawsuits under Title VII are subject to equitable tolling. *Irwin*, 498 U.S. at 95; *Zipes*, 455 U.S. at 394; *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349, n.3 (1983); *Jones*, 744 F.2d at 1314. Equitable tolling applies in situations where the claimant has been prevented in some extraordinary way from filing his complaint in time. *Irwin*, 498 U.S. at 96; *Threadgill*, App. 4a; *Jones*, 744 F.2d at 1314.

In this case, the Court of Appeals held that principles of equitable tolling do not apply to petitioner, because "[h]e did not act at all" after he received the notice of right to sue. App. 5a. But why should he have acted? As the Eleventh Circuit noted in *Stallworth*, a claimant who hires an attorney and affirmatively requests that the EEOC notify the attorney of the issuance of the notice of right-to-sue is, reasonably speaking, already actively pursuing his legal remedies so as to qualify for equitable relief. 936 F.2d at 525. A reasonable

person in petitioner's situation could be expected to do as he did – rely upon the system to work as it should and upon his attorney to do what he was hired to do.

Petitioner did nothing to cause the EEOC's failure to notify his attorney, and he has "clean hands." He was led to believe that his attorney would be receiving a copy of the notice, both because the attorney explicitly requested that of the EEOC and because it was his normal experience as the claimant in this matter that his lawyer received originals or copies of every document that also came to him. Therefore, when he received his copy of the notice there was no reason for him to take any further action personally.[8] Such circumstances constitute grounds for equitable tolling.

The instant action is distinguishable from the leading cases in this Court in which equitable tolling was held not to apply. In *Irwin*, the Court found equitable tolling inapplicable and eschewed what it called "at best a garden variety claim of excusable neglect." 498 U.S. at 96. The neglect there was of an attorney who did not file suit on time after *having been served* with the notice. The mistake was his, not the EEOC's, and his error truly was the sort of thing that, regretfully, occurs every day among lawyers. His office received the notice, and a professional office is equipped to deal with that kind of matter on a routine basis. The underlying principle of *having* representation is to prevent folly like that which has occurred because of the agency's failure in this case.[9]

---

8. Petitioner's attorney, also relying upon the good-faith belief that he would receive a copy of the notice, based upon both his request and the normal policy of the EEOC, was reasonable in his belief that the notice of right to sue had not been issued.

9. As the Court of Appeals noted in this case, *Irwin* made reference to the "adversary's misconduct" having to do with allowing

(Cont'd)

In *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), the Court held that the failure to file suit within the 90-day period was no basis for equitable tolling, where the district court had specifically informed the plaintiff of the 90-day requirement and a federal magistrate had reminded her of it. 466 U.S. at 151. The plaintiff was told three times what she needed to do to preserve her claim, and she did not do it. *Id.* The situation in *Brown* was substantially different from the case at bar.

It is profoundly unjust to deny petitioner his day in court where the EEOC failed to do its job and thereby rendered his attorney unable to do his. This case presents the unusual circumstances which justify invoking the doctrine of equitable tolling.

(Cont'd)
the filing deadline to pass. *See* App. 5a; *Irwin*, 498 U.S. at 96. In the case at bar, there was a breach of duty by a government agency, instead of adversarial misconduct. Where principles of equity are concerned, it is logical to view government misconduct as an even stronger basis for relief than misconduct by an adverse party. To do so would not be unfair in this case. The record is devoid of evidence or argument that a ruling in favor of the petitioner would prejudice or otherwise harm the respondent.

CONCLUSION

For the foregoing reasons, petitioner requests that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

DAVID E. LASKER
Counsel of Record
SHNEIDMAN, HAWKS & EHLKE, S.C.
Attorneys for Petitioner
217 South Hamilton Street - Suite 400
Post Office Box 2155
Madison, Wisconsin 53701-2155
(608) 257-0040

Dated: January 17, 2002

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED OCTOBER 19, 2001

In the

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-1051

WINDELL THREADGILL,

Plaintiff-Appellant,

v.

MOORE U.S.A., INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 00-C-0553—**John C. Shabaz, *Judge***

ARGUED SEPTEMBER 5, 2001
DECIDED OCTOBER 19, 2001

Before FLAUM, *Chief Judge*, and POSNER and RIPPLE, *Circuit Judges*.

FLAUM, *Chief Judge*. Plaintiff Windell Threadgill appeals the district court's grant of summary judgment in favor of the defendant on plaintiff's Title VII claim and dismissal of plaintiff's complaint as time-barred. For the reasons stated herein, we affirm.

Appendix A

I. Background

Threadgill worked at the Monroe, Wisconsin manufacturing facility of Moore U.S.A., Inc. ("Moore") from May 23, 1983, until September 22, 1997. In January 1998, Threadgill filed a complaint with the Wisconsin Department of Workforce Development and the United States Equal Employment Opportunity Commission ("EEOC"), alleging that he had been harassed, intimidated, denied promotional opportunities, and terminated based on race. The Wisconsin agency dismissed the complaint, and Threadgill eventually withdrew his appeal of that determination.

This opinion concerns the complaint filed with the EEOC. On October 11, 1999, David Lasker, Threadgill's attorney, sent to the EEOC's Milwaukee District Office a written request for a right-to-sue notice. In this letter, Lasker requested a copy of the notice. On November 18, 1999, the EEOC mailed the notice to Threadgill who received it soon thereafter. Threadgill did not immediately inform Lasker of the notice. In fact, Threadgill put the notice aside and neither acted on it nor mentioned its existence to his attorney for nearly seven months. Lasker never received a copy of the right-to-sue letter from the EEOC. It was not until June 16, 2000, that Lasker discovered that Threadgill had received the notice—well past the 90-day limit for filing suit. Although the notice clearly stated that the lawsuit "must be filed within 90 days of your receipt of this Notice," neither Threadgill nor Lasker took action within 90 days. On September 6, 2000, Lasker requested a second right-to-sue notice. In that letter, he claimed that because he did not receive a copy as requested, a second notice should be issued. The EEOC

denied Lasker's request, and Plaintiff brought his Title VII claim in the Western District of Wisconsin on September 11, 2000. After giving the parties opportunity to present all relevant material, the district court ordered on December 11, 2000, that Moore's motion for summary judgment be granted and that Threadgill's complaint be dismissed as time-barred with prejudice and costs.

II. Discussion

We review the district court's grant of summary judgment *de novo,* construing all of the facts and reasonable inferences that can be drawn from those facts in favor of the nonmoving party. *See Central States, Southeast & Southwest Areas Pension Fund v. Fulkerson*, 238 F.3d 891, 894 (7th Cir.2001). A grant of summary judgment is appropriate if the pleadings, affidavits, and other supporting materials leave no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

A.

A civil action alleging a Title VII violation must be filed within 90 days of receiving a right-to-sue notice from the EEOC. 42 U.S.C. § 2000e-5(f)(1). Although the statute itself does not specify who the recipient of the notice must be, our case law is unambiguous. "The 90-day period of limitation set forth in 42 U.S.C. § 2000e-5(f)(1) begins to run on the date that the EEOC right-to-sue notice is actually received *either by the claimant or by the attorney representing him in the Title VII action.*" *Jones v. Madison Service Corp.*, 744 F.2d 1309, 1312 (7th Cir.1984) (emphasis added);

see also Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 92 (1990); *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 532 n. 11 (7th Cir.1993). Threadgill's contention that the 90-day period should have begun to run only after his attorney received the notice is a misreading of the precedent. Two types of receipt of a right-to-sue notice can start running the 90-day limitation period, and each does so equally well: actual receipt by the plaintiff, and actual receipt by the plaintiff's attorney (as such receipt constitutes constructive receipt by the plaintiff). *See Jones*, 744 F.2d at 1312. Both methods of receipt focus on notice to the plaintiff. The attorney's receipt is pertinent only because he is an agent of the plaintiff. If, as in the instant case, the plaintiff actually receives notice from the EEOC, the attorney's receipt is irrelevant; it simply is not required for the 90-day period to begin running. Threadgill takes the holdings of Supreme Court and Seventh Circuit case law, which state that the 90-day period begins upon notice to the attorney *or* to the plaintiff, and reads them to state that *only* upon notice to the attorney does the clock begin to tick. Nowhere in our case law is such a result suggested.

B.

Threadgill next contends that the principle of equitable tolling should be applied to excuse his failure to comply with the 90-day limitations period. Equitable tolling, however, is reserved for situations in which the claimant "has made a good faith error (*e.g.*, brought suit in the wrong court) or has been prevented in some extraordinary way from filing his complaint in time." *Jones*, 744 F.2d at 1314. Threadgill did not make a good faith error such as filing in the wrong court.

He did not act at all, even though the right-to-sue notice clearly stated that he must file within 90 days. The courts have allowed equitable tolling where the claimant "has *actively* pursued his judicial remedies . . . or has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 96 (emphasis added). To say that a claimant who receives the notice but does not read it or ask his attorney to explain it within the 90 days should be exempt from the limitations period under the principle of equitable tolling renders the procedural rule itself meaningless. Threadgill's contention that the EEOC induced or tricked him into allowing the deadline to pass by failing to send a copy of the notice to his attorney is unsupported.[1] The EEOC did not act deceitfully. It sent Threadgill a right-to-sue notice that clearly indicated the 90-day limitation. The failure to send a copy to the attorney does not amount to trickery or inducement. While Threadgill's failure to understand the implications of the right-to-sue notice elicits sympathy, "[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984).

---

1. Threadgill's claim that the EEOC misled him into allowing the deadline to pass cites language from a case that would allow equitable tolling because of an adversary's trickery. *See Irwin*, 498 U.S. at 96. Whether any alleged malfeasance by the EEOC would also suffice to toll the limitations period is an issue that we need not reach as there is no support for any claim of trickery or inducement by the EEOC.

Appendix A

III. Conclusion

Because the 90-day period of limitations begins when either the complainant or his attorney receives the right-to-sue notice, and because the doctrine of equitable tolling does not apply, Threadgill's suit is time-barred and we AFFIRM the judgment of the district court.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN ENTERED DECEMBER 11, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

00-C-553-S

WINDELL THREADGILL,

Plaintiff,

v.

MOORE U.S.A., Inc.,

Defendant.

MEMORANDUM AND ORDER

Plaintiff Windell Threadgill commenced this civil action pursuant to Title VII alleging that defendant Moore U.S.A., Inc. subjected him to a hostile work environment and discriminated against him on the basis of his race. He also alleges he was retaliated against for complaining about discrimination.

On October 26, 2000 defendant filed a motion to dismiss or in the alternative a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law, affidavits and a brief in support thereof. The Court pursuant

to Rule 12 (b) (6) has treated the motion as one for summary judgment the parties having been given reasonable opportunity to present all material relevant to such a motion by Rule 56 which has now been fully briefed.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendant's motion for summary judgment the Court finds there is no genuine dispute as to any of the following material facts.

Appendix B

Plaintiff Windell Threadgill is an adult resident of Freeport, Illinois. Defendant Moore U.S.A., Inc., is an Illinois corporation which operates a manufacturing facility located in Monroe, Wisconsin. Plaintiff was employed at the Monroe facility from May 23, 1983 until September 22, 1997.

On January 29, 1998 plaintiff filed a complaint with the Wisconsin Department of Workforce Development (the Department) and the United States Equal Employment Opportunity Commission (EEOC) alleging that he had been harassed, intimidated, denied training and promotional opportunities and terminated because of his race by the defendant. The Department dismissed the complaint on June 14, 1999 finding no evidence that plaintiff had been discriminated against. Plaintiff appealed the determination but later withdrew the appeal.

On October 11, 1999 plaintiff's counsel, David E. Lasker, wrote a letter to the Director of the Milwaukee District Office of the EEOC requesting the issuance of a Notice of Right to Sue letter and that he be sent a copy of the letter. The EEOC issued the letter on November 18, 1999. Thereafter plaintiff received the Notice of Right to Sue letter by mail which states: "Your lawsuit under Title VII or the ADA **must be filed in federal court *WITHIN 90 Days* of your receipt of this Notice.**"

On June 16, 2000 plaintiff had a conversation with his attorney at which time counsel discovered plaintiff had previously received the Notice of Right to Sue letter the preceding November. Plaintiff faxed counsel the letter June 16, 2000 after the conversation of that day. On September 6,

2000 plaintiff's attorney wrote the EEOC requesting issuance of a second notice of right to sue letter because he had not received a copy of the first one. His letter states:

> Very recently, it has come to my attention that you issued a Notice of Right to Sue on or about November 18, 1999 in the above captioned matter. You never sent me a copy of the Notice of Right to Sue, despite my explicit request in my letter requesting the issuance of it that you send a copy to me as well as to my client.

On September 11, 2000 the EEOC denied the request of plaintiff's counsel. Plaintiff commenced this lawsuit the same day.

MEMORANDUM

Defendant contends that plaintiff's claims under Title VII are time-barred. A civil action alleging violations of Title VII must be filed within 90 days of receiving a right-to-sue notice. 42 U.S.C. § 2000e-5(f)(1). The time period commences when a claimant has actual knowledge of the Notice of Right to Sue letter. *Jones v. Madison Service Corp.*, 744 F. 2d 1309, 1313 (7th Cir. 1984). The Court stated: "such knowledge is conveyed equally well through personal receipt of the right-to-sue letter by the claimant and through receipt of that letter by the attorney representing him in the action."

According to *Jones*, the 90 day time period to file a federal lawsuit commenced on the day shortly after November

18, 1999 when plaintiff personally received the Notice of Right to Sue letter. Plaintiff's argument that the time period did not begin until his counsel received the notice on June 16, 2000 is inconsistent with *Jones*. Plaintiff had 90 days from the date he received the Notice of Right to Sue letter in November 1999 to file his lawsuit. He failed to do so. Accordingly, his Title VII claims are time barred.

Equitable tolling of the 90 days applies in limited circumstances when disability or circumstances beyond a party's control make it impossible for a party to file suit within the statutory period. *Miller v. Runyon*, 77 F.3d 189, 191 (7th Cir. 1996). Equitable tolling is to be reserved only for situations where the claimant has made a good faith error or has been prevented in some extraordinary way from filing his complaint in time. *Jones*, 744 at 1314.

In this case plaintiff received the Notice of Right to Sue letter in November 1999 which clearly advised that he had 90 days to file a federal lawsuit. He did nothing, relying on the fact that his attorney would receive a copy of the letter. This does not constitute a good faith error or extraordinary circumstances. Upon the receipt of the letter he failed to contact his lawyer. Where he had no attorney it would have been his responsibility to file the lawsuit.

After requesting from the EEOC the Notice of Right to Sue letter in October 1999 counsel failed to take any further steps until June 16, 2000. At that time he talked to plaintiff and determined plaintiff had received the letter about seven or eight months earlier. Counsel did nothing until September 6, 2000 when he requested a second Notice of

Appendix B

Right to Sue letter. When his request was denied he filed this lawsuit. Equitable tolling is not applicable to this case where neither plaintiff not his counsel pursued this matter in a timely fashion.

Defendant's motion for summary judgment will be granted, and plaintiff's claims will be dismissed as time-barred. Defendant's claim that it was not properly served with a summons is moot because of this dismissal.

ORDER

IT IS ORDERED that defendant's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendant against plaintiff DISMISSING his complaint and all claims contained therein as time-barred with prejudice and costs.

Entered this 11th day of December, 2000.

BY THE COURT:

s/ John Shabaz
JOHN C. SHABAZ
District Judge

(2)

Supreme Court, U.S.
FILED
FEB 25 2002

No. 01-1082

IN THE

Supreme Court of the United States

WINDELL THREADGILL,

Petitioner,

v.

MOORE NORTH AMERICA, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

LAURENCE B. OPPENHEIMER
Counsel of Record
ROBERT P. HEARY
HISCOCK & BARCLAY, LLP
Attorneys for Respondent
1100 M&T Center
Three Fountain Plaza
Buffalo, NY 14203-1486
(716) 856-5400

172508

COUNSEL PRESS
(800) 274-332 • (800) 359-6859

21 pp

QUESTION PRESENTED

Although Petitioner admits receiving a right-to-sue notice from the Equal Employment Opportunity Commission ten (10) months prior to filing his Title VII lawsuit, should his delay be excused because his attorney did not receive a copy of the right-to-sue notice?

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner, Windell Threadgill, is a resident of the State of Wisconsin and former employee of Respondent, Moore North America, Inc., f/k/a Moore U.S.A., Inc.

Respondent, Moore North America, Inc., f/k/a Moore U.S.A., Inc., is a wholly owned subsidiary of Moore Corporation Limited, a publicly traded Canadian corporation.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding and Rule 29.6 Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Cited Authorities	iv
Statute Involved in the Case	1
Statement of the Case	1
Reasons for Denying the Writ	4
I. There Is No Conflict Between The Circuits That The 90-Day Limitations Period Under Title VII Begins To Run On The Date The EEOC Right-To-Sue Notice Is Received By The Claimant Or The Attorney Representing Him.	4
II. Nothing In The Decision Of The United States Court Of Appeals For The Seventh Circuit Conflicts With This Court's Decisions Nor Is Equitable Tolling Of The 90-Day Limitation Period Appropriate In This Case.	10
Conclusion	14

TABLE OF CITED AUTHORITIES

Page

Cases:

Anooya v. Hilton Hotels Corp., 733 F.2d 48 (7th Cir. 1984) 5, 7

Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984) 12

Ball v. Abbott Advertising, Inc., 864 F.2d 419 (6th Cir. 1988) 7

Espinoza v. Missouri Pacific Railway Co., 754 F.2d 1247 (5th Cir. 1985) 7

Harvey v. City of New Bern Police Dep't., 813 F.2d 652 (4th Cir. 1987) 7

Irwin v. Dep't of Veterans Affairs, 498 U.S. 89 (1990) 4, 5, 10, 11, 12, 13

Jones v. Madison Service Corp., 744 F.2d 1309 (7th Cir. 1984) 4, 5, 12

Law v. Hercules, Inc., 713 F.2d 691 (11th Cir. 1983) 8

Leonard v. Rumsfield, 146 F. Supp. 2d 1227 (M.D. Ala. 2001) 9

Miller v. Runyon, 77 F.3d 189 (7th Cir. 1996) 12

Cited Authorities

	Page
Million v. Frank, 47 F.3d 385 (10th Cir. 1995)	7, 13
Noe v. Ward, 754 F.2d 890 (10th Cir. 1985)	5, 6, 7
Saxton v. American Tel. & Tel. Co., 10 F.3d 526 (7th Cir. 1993)	4
Scholar v. Pacific Bell, 963 F.2d 264 (9th Cir. 1992)	7
Seitzinger v. Reading Hosp. and Medical Center, 165 F.3d 236 (3d Cir. 1999)	4
Stallworth v. Wells Fargo Armored Services Corp., 936 F.2d 522 (11th Cir. 1991)	8, 9
Statutes:	
42 U.S.C. § 2000e *et seq.*	1
42 U.S.C. § 2000e-5(f)(1)	1, 3, 4, 8, 13
Rules:	
Fed. R. Civ. P. 1	11
Fed. R. Civ. P. 5(b)	11

Cited Authorities

Page

Other Authorities:

29 C.F.R. § 1601.28 11

Moore's Federal Practice, § 1.20 (Matthew Bender 3d ed.) 11

STATUTE INVOLVED IN THE CASE

The limitations period for commencing an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, is set out at 42 U.S.C. § 2000e-5(f)(1) which, in pertinent part, states as follows:

> [I]f within one hundred and eighty days from the filing of such charge . . . , the Commission has not filed a civil action under this section, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so **notify the person aggrieved and within ninety days after the giving of such notice** a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved . . .

42 U.S.C. § 2000e-5(f)(1) (emphasis added).

STATEMENT OF THE CASE

Respondent, Moore North America, Inc. f/k/a Moore U.S.A., Inc. ("Moore") is a leader in providing information handling products and services to a wide variety of businesses throughout the United States. (District Court Docket, hereinafter "R.," No. 7 at ¶¶ 4-6). Among other products and services, Moore produces and distributes business forms which facilitate the recording, retention, processing, retrieval and communication of business information. *Id.* Between May 23, 1983 and September 22, 1997, the Petitioner was employed by Moore at its Monroe, Wisconsin facility. *Id.*

On January 29, 1998, Petitioner filed a charge with the Wisconsin Department of Workforce Development ("the Department"), as well as the United States Equal Employment Opportunity Commission ("EEOC"), alleging that, in connection with his employment by Moore, he had been harassed, intimidated, denied training and promotional opportunities, and was terminated because of his race in violation of the Wisconsin Fair Employment Law and Title VII of the Civil Rights Act of 1964. (R.7 at ¶¶ 7-8; Ex. A). The Department dismissed the Petitioner's charge on June 14, 1999 because it concluded that there was no evidence to support Petitioner's claim of race discrimination. (R.7 at ¶¶ 9-10; Ex. B). Petitioner appealed the Department's determination but subsequently withdrew his appeal and requested that the EEOC issue a right-to-sue notice to him. (R.7 at ¶¶ 11-12; Ex. C.; R.15 at ¶4).

Pursuant to this request, the EEOC issued a right-to-sue notice to the Petitioner on November 18, 1999. (R.15 at ¶ 5; Ex. 2). Although he received the right-to-sue notice shortly after November 18, 1999, the Petitioner did not commence a lawsuit against Moore within 90 days of receiving the right-to-sue notice. (R.15 at ¶¶6-8). Rather, Petitioner sat on his rights for seven months until June 16, 2000 when he provided the notice to his attorney. *Id.* At that time, his right-to-sue letter was again set aside for nearly an additional three months, until September 6, 2000, when Petitioner's attorney sent a letter to the EEOC requesting the issuance of a second right-to-sue notice. *Id.*; (R.8 at ¶¶ 7-8; Ex. B). On September 11, 2000 the EEOC responded to the Petitioner's attorney and refused to issue a second right-to-sue notice. (R.8 at ¶ 9; Ex. C).

The Petitioner filed his complaint in the United States District Court for the Western District of Wisconsin on September 11, 2000, almost ten months after he received the right-to-sue notice. The complaint purports to set forth claims of unlawful discrimination and retaliation under Title VII, arising out of Petitioner's employment and separation from employment at Moore's Monroe, Wisconsin manufacturing facility. On October 26, 2000, Moore filed a motion to dismiss or, in the alternative, for summary judgment, in relevant part, on the grounds that Petitioner's Title VII claims were time-barred pursuant to 42 U.S.C. § 2000e-5(f)(1), since he failed to commence the action within 90 days of receiving his right-to-sue notice from the EEOC and there was no basis upon which the Petitioner could invoke equitable tolling. On December 11, 2000, the District Court granted Moore's motion for summary judgment as to all of the Petitioner's claims, holding that Petitioner's Title VII claims were time-barred because such claims were not timely filed and equitable tolling of the limitations period was unavailable. (Petition for a Writ of Certiorari, hereinafter "Petition," at Appendix B).

Petitioner filed a Notice of Appeal on January 4, 2001 requesting that the United States Court of Appeals for the Seventh Circuit review the District Court decision granting Moore's motion to dismiss, or in the alternative, motion for summary judgment. The Court of Appeals affirmed the judgment entered by the District Court in favor of Moore. (Petition at Appendix A).

REASONS FOR DENYING THE WRIT

There is no conflict between the Circuit Courts of Appeals nor an important question of federal law that has not but should be settled by this Court. On the contrary, both the District Court and the Court of Appeals correctly applied the statute of limitations under 42 U.S.C. § 2000e-5(f)(1), as well as the federal case law thereunder, in determining that the Petitioner's Title VII claims are time-barred because he failed to file his lawsuit within 90 days after receiving actual notice of his right to sue. Moreover, both courts below properly found equitable tolling of the 90-day limitations period is not permissible since the Petitioner failed to act in a timely fashion and such failure to act was neither the result of a good faith error nor extraordinary circumstances.

I. THERE IS NO CONFLICT BETWEEN THE CIRCUITS THAT THE 90-DAY LIMITATIONS PERIOD UNDER TITLE VII BEGINS TO RUN ON THE DATE THE EEOC RIGHT-TO-SUE NOTICE IS RECEIVED BY THE CLAIMANT OR THE ATTORNEY REPRESENTING HIM.

42 U.S.C. § 2000e-5(f)(1) requires that a civil action alleging a violation of Title VII must be filed within 90 days of receiving a right-to-sue notice. The limitations period set forth in § 2000e-5(f)(1) begins to run on the date that the EEOC right-to-sue notice is received by *either* the claimant *or* by the attorney representing him in the Title VII action. *Jones v. Madison Service Corp.*, 744 F.2d 1309, 1312 (7th Cir. 1984); *see also Seitzinger v. Reading Hosp. and Medical* Center, 165 F.3d 236, 239 n.1 (3d Cir. 1999); *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 532 n.11 (7th Cir. 1993). Indeed, in *Irwin v. Dep't of Veterans Affairs*, 498 U.S.

89 (1990), Justice White, in his concurring opinion, explicitly noted that the limitations period "begins to run when notice from the Equal Employment Opportunity Commission is delivered either to the claimant or the claimant's attorney . . ." *Irwin*, 498 U.S. at 96.

The 90-day period is strictly applied and even one day's delay beyond 90 days is fatal to the claim unless the delay is excused. *See, e.g., Noe v. Ward*, 754 F.2d 890 (10th Cir. 1985) (plaintiff's Title VII action time-barred where plaintiff filed complaint 94 days after plaintiff's receipt of right-to-sue notice); *Anooya v. Hilton Hotels Corp.*, 733 F.2d 48 (7th Cir. 1984) (plaintiff's Title VII action time-barred where plaintiff filed complaint 91 days after plaintiff received EEOC right-to-sue notice).

In *Jones*, the claimants, who did not receive right-to-sue letters from the EEOC due to their failure to provide their current addresses, argued that the 90-day period did not commence until they received copies of the right-to-sue letter from their attorney. The Seventh Circuit Court of Appeals rejected the claimants' argument, stating:

> We believe that the most crucial concept in this matter, and a concept that determined many of these decisions . . . is the actual knowledge that the time period in which a suit can be filed has commenced. **Such knowledge is conveyed equally well though personal receipt of the right-to-sue letter by the claimant and through receipt of that letter by the attorney representing him in the action.**

744 F.2d at 1313 (emphasis added).

Here, there is no dispute that the Petitioner personally received a right-to-sue notice shortly after November 18, 1999 and was thereby put on notice of his legal rights at that time. (R.15 at ¶ 5; Ex. 2). Upon receipt of the notice, Petitioner did not commence any lawsuit nor did he attempt to contact his attorney or make a copy of the right-to-sue notice to send to his attorney. (R.15 at ¶¶ 6-8). Rather, he simply "placed the document in [his] papers." (R.15 at ¶ 5). After learning on June 16, 2000 that his client had received the right-sue-notice, the Petitioner's attorney then inexplicably waited until September 6, 2000 to send a letter to the EEOC requesting a second right-to-sue notice. (R.15 at ¶¶ 6-8; R.8 at ¶¶ 7-8; Ex. B). After the EEOC properly rejected this request, the Petitioner filed the complaint on September 11, 2000, nearly ten months after receipt of the right-to-sue notice and well beyond the 90-day limitations period, alleging that the lawsuit was timely commenced within 90 days of the Petitioner receiving actual notice of his right to sue.

On this record, the Seventh Circuit properly held that the 90-day period began to run when the Petitioner personally received the right-to-sue letter at his residence. "If, as in the instant case, the plaintiff actually receives notice from the EEOC, the attorney's receipt is irrelevant; it simply is not required for the 90-day period to begin running." *Threadgill v. Moore U.S.A., Inc.*, 269 F.3d 848, 850 (7th Cir. 2001). This is the same conclusion reached by the Tenth Circuit in *Noe v. Ward*, 754 F.2d 890 (10th Cir. 1985), in which the Court held that the limitations period began to run at the time that the "aggrieved party" personally received the right-to-sue notice. In *Noe*, the fact that the Plaintiff's attorney did not receive the notice until seven days later was irrelevant in determining the date on which the 90-day period commenced.

> In the instant case, the Plaintiff herself received notice more than 90 days before suit was filed. She may not now complain that the 90-days does not begin to run until the receipt of the "right-to-sue" letter by her attorney seven days later.

Noe, 754 F.2d at 892. Moreover, as petitioner acknowledges, the Sixth Circuit long ago rejected the argument he is advancing. *See Ball v. Abbott Advertising, Inc.*, 864 F.2d 419 (6th Cir. 1988)

In the instant case, the Petitioner's claim is untimely because *the Petitioner personally received the notice* at his home more than 90 days prior to commencing his lawsuit. The courts have uniformly held that a plaintiff who files his complaint more than 90 days after personal receipt of the right-to-sue notice is untimely, except in unusual circumstances where principles of equitable tolling apply. *See, e.g., Noe v. Ward*, *supra*; *Aoya*, *supra*; *Million v. Frank*, 47 F.3d 385, 388 (10th Cir. 1995) ("receipt at a plaintiff's address of the right to sue letter constitutes receipt sufficient to start the running of the time period for filing a discrimination action"); *Scholar v. Pacific Bell*, 963 F.2d 264, 267 (9th Cir. 1992) (plaintiff's action, filed 91 days after the right-to-sue letter was received at plaintiff's residence, was time-barred.); *Harvey v. City of New Bern Police Dept.*, 813 F.2d 652 (4th Cir. 1987) (90-day limitations period began running when the right-to-sue letter was received at plaintiff's home); *Espinoza v. Missouri Pacific Railway Co.*, 754 F.2d 1247, 1250 (5th Cir. 1985) ("the giving of notice to the claimant at the address designated by him suffices to start the ninety-day period unless the claimant, through no fault of his own, failed to receive the right-to-sue letter or unless,

for some other equitable reason, the statute should be tolled until he actually receives notice"); *Law v. Hercules, Inc.*, 713 F.2d 691 (11th Cir. 1983) (receipt of the right-to-sue letter at plaintiff's home triggered the limitations period).

The Petitioner argues that the 90-day limitations period should not begin to run until his attorney learned that the Petitioner had received the notice of right-to-sue. Putting aside the Petitioner's failure to plead facts in the complaint sufficient to invoke the District Court's equitable powers to toll a statute of limitations, as the EEOC itself pointed out to the Petitioner, the period of limitations set forth in § 2000e-5(f)(1) begins to run on the date that the EEOC right-to-sue notice is actually received by either the claimant or by the attorney representing him in the Title VII action. (R.8 at ¶¶ 9-10; Ex. C). Here, the Petitioner admits that he personally received the right-to-sue notice shortly after it was mailed to him on November 18, 1999, (R.15 at ¶5), thus commencing the 90-day limitations period on that date.

The Petitioner's attempt to assert a new legal standard for the commencement of the 90-day period under Title VII is unsupported by any relevant caselaw. As such, it is insufficient to overcome the overwhelming authority holding that Petitioner's actual receipt of the right-to-sue notice in this case commenced the 90-day limitations period.

Plaintiff claims that the decision of the Eleventh Circuit Court of Appeals in *Stallworth v. Wells Fargo Armored Services Corp.*, 936 F.2d 522 (11th Cir. 1991), is at odds with the decisions of other Circuit Courts of Appeals. However, in *Stallworth*, unlike the instant case, "[t]he unrebutted testimony was that [the plaintiff] neither received nor knew about the right-to-sue letter." *Stallworth*, 936 F.2d

at 524. Rather, the right-to-sue letter was received by the plaintiff's nephew, while the plaintiff was not residing at the address, and the nephew never provided the right-to-sue letter to the plaintiff. Moreover, no copy of the right-to-sue letter was provided to the plaintiff's attorney. The facts in *Stallworth* are a far cry from this case, in which it is undisputed that the Petitioner *actually received* the right-to-sue letter more than 90-days prior to commencing his lawsuit.

Indeed, the United States District Court for the Middle District of Alabama, in *Leonard v. Rumsfield*, 146 F. Supp. 2d 1227 (M.D. Ala. 2001), recognized the significance of a plaintiff's personal receipt of the right-to-sue letter and distinguished *Stallworth* from those cases in which the "aggrieved party" actually receives the notice. Accordingly, in *Leonard*, the Court concluded that "the ninety-day statutory period began to run when plaintiff herself received the right-to-sue notice, *notwithstanding the fact that the plaintiff, as in Stallworth, requested that her attorney be provided a copy of the right-to-sue notice but the EEOC did not send a copy to her attorney.*" *Leonard*, 146 F. Supp. 2d at 1236 (emphasis added). Plaintiff's actual receipt of the final agency decision commenced the running of the ninety-day period, despite the EEOC's failure to provide the notice to Plaintiff's attorney. *Leonard*, 146 F. Supp. 2d at 1237.

Simply stated, the 90-day limitations period under Title VII commences when **either** the plaintiff **or** his attorney receives a right-to-sue notice. Here, the 90-day period commenced on the date Petitioner received a notice of right-to-sue and was put on actual notice that he had a period of 90 days to commence litigation under Title VII. Petitioner's attempt to save his otherwise stale claims by fashioning a new legal theory (i.e., that the 90-day period does not begin

to run until a claimant's attorney receives a notice of right-to-sue, even though the claimant has already received such notice) is not supported by the statute or the relevant caselaw. The District Court correctly determined that the Petitioner's Title VII claims are time-barred and the Seventh Circuit properly affirmed that decision.

II. NOTHING IN THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT CONFLICTS WITH THIS COURT'S DECISIONS NOR IS EQUITABLE TOLLING OF THE 90-DAY LIMITATION PERIOD APPROPRIATE IN THIS CASE.

Petitioner's reliance on *Irwin*, in which this Court held that the 30-day period applicable to Title VII claims against the federal government began to run when the notice from the EEOC was delivered to the claimant's attorney, is misplaced. In *Irwin*, the claimant's attorney received a copy of the right-to-sue letter on March 23, 1987, but did not learn of the letter until April 10, 1987 because he was out of the country at the time of delivery. *Id.* at 91. The plaintiff received the right-to-sue notice on April 7, 1987. *Id.* The Title VII lawsuit was commenced on May 6, 1987, 44 days after the EEOC notice was received by the attorney's office, but 29 days after plaintiff allegedly received the notice. *Id.* The plaintiff argued that his action was timely commenced since he did not personally receive the notice until April 7, 1987. This Court held that the 30-day period began running when the plaintiff's attorney first received the notice at his office, on March 23, 1987, and the plaintiff's action was therefore untimely. *Id.* at 92. In so holding, this Court stated, "§2000e-16(c) requires only that the EEOC notification letter be 'received'; it does not specify receipt by the claimant rather

than by the claimant's designated representative." *Id.* In the instant matter, the Petitioner personally received the right-to-sue letter, which commenced the running of the limitations period.[1]

There is simply no support for the Petitioner's position that the limitations period did not begin to run at the time that the right-to-sue notice was actually received by the Petitioner. As noted above, the courts have uniformly held that personal receipt of the right-to-sue notice by the charging party triggers the limitations period under Title VII. Perhaps in acknowledgement of the difficulty involved in convincing a court to apply equitable tolling, the Petitioner attempts to shift blame to the EEOC, suggesting that it is somehow responsible for the Petitioner's failure to timely file this lawsuit. However, nothing in the EEOC's regulations regarding issuance of a right-to-sue notice, 29 C.F.R. § 1601.28; the EEOC compliance manual; or any other authority cited by Petitioner, including Rule 5(b) of the Federal Rules of Civil Procedure, suggests that the actual receipt of the right-to-sue notice by the Petitioner should be rendered a nullity simply because a copy of the notice was not provided to the Petitioner's attorney.[2]

---

1. Indeed, the Petitioner's argument ignores the fact that his request for a right-to-sue notice explicitly asked that the notice be sent to Petitioner, with only a copy going to his attorney's office. (R.15 at Ex. 1).

2. Petitioner's attempt to tether his argument to Rule 5(b) ignores the fact that the right-to-sue notice involved in this matter is a condition precedent to the commencement of formal litigation to which the Federal Rules apply. *See* Rule 1, Federal Rules of Civil Procedure; *see also* Vol. 1 Moore's Federal Practice, § 1.20 (Matthew Bender 3d ed.).

Petitioner's suggestion that equitable tolling is appropriate in the instant case is also misplaced. In this regard, principles of equitable tolling should not be applied to what is, at best, a garden variety claim of neglect and "[f]ederal courts have typically extended equitable relief only sparingly." *Irwin*, 498 U.S. at 96. In fact, the remedy of equitable tolling is reserved for situations in which the claimant has made a good faith error (e.g., brought suit in the wrong court) or has been prevented in some extraordinary way from filing his complaint in time. *See, e.g., Miller v. Runyon*, 77 F.3d 189, 191 (7th Cir. 1996); *Jones*, 744 F.2d at 1314. Here, the Petitioner blithely stated in his complaint that actual notice of the right to sue occurred less than ninety (90) days prior to filing. The Petitioner's complaint is silent regarding the delays in filing his lawsuit and provides no support for a claim that the Petitioner be granted a tolling period within which to file his otherwise stale claims. Simply put, there is nothing whatsoever contained in the complaint or the record before the Court that could warrant equitable tolling.

As this Court admonished almost two decades ago, in *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin County*, 466 U.S. at 151. Clearly, in the instant matter, the Petitioner cannot invoke the doctrine of equitable tolling to excuse his neglect in setting aside the right-to-sue notice he received from the EEOC for a period of approximately seven months before notifying his attorney that he had received it. The Petitioner personally received an EEOC right-to-sue notice shortly after it was issued on November 18, 2000, and failed to file the complaint until September 11, 2000, nearly ten months after receiving notice of his rights. The Petitioner's inaction gives rise to the type of "garden variety claim of excusable neglect" to which equitable tolling is inapplicable.

Given his admitted laches, the Petitioner has not argued (nor can he argue) that the 90-day limitations period should be tolled because he did not receive the right-to-sue letter due to circumstances beyond his control. The Petitioner admits that, upon receiving the right-to-sue letter, he did not read the right-to-sue letter, contact his attorney regarding its contents, or send a copy of the right-to-sue letter to his attorney. (R.15 at ¶5). Instead, the Petitioner "simply placed the document in [his] papers." *Id.* Clearly, the Petitioner cannot maintain that his disregard of the right-to-sue notice constitutes an "extraordinary circumstance" to which equitable tolling should be applied. *See, e.g., Million v. Frank*, 47 F.3d 385, 389 (10th Cir. 1995) ("the doctrine of equitable tolling cannot be applied simply because the Petitioner chose to examine his mail on a weekly basis rather than as it arrived"). The Petitioner's inattentiveness is simply not a sufficient basis for tolling the 90-day limitations period.

Neither smoke nor mirrors can assist the Petitioner in escaping the undisputed fact that he received the notice and disregarded it for a period of approximately seven months prior to informing his attorney and then sat on it for almost three additional months before filing the complaint in this case. The Petitioner's failure to exercise diligence in preserving his legal rights is exactly the type of conduct toward which this Court has "generally been much less forgiving." *Irwin*, 498 U.S. at 96. Since the Petitioner's claims are fatally flawed in that they were not timely filed pursuant to 42 U.S.C. § 2000e-5(f)(1) and he is not entitled to equitable tolling of the limitation period, the Petitioner's claims were properly dismissed.

CONCLUSION

For all the reasons noted above, the Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

LAURENCE B. OPPENHEIMER
Counsel of Record
ROBERT P. HEARY
HISCOCK & BARCLAY, LLP
Attorneys for Respondent
1100 M&T Center
Three Fountain Plaza
Buffalo, NY 14203-1486
(716) 856-5400

Supreme Court, U.S.
FILED
MAR 13 2002
OFFICE OF THE CLERK

(3)

01-1082

IN THE

Supreme Court of the United States

WINDE THREADGILL,

Petitioner,

v.

MOOI U.S.A., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

DAVID E. LASKER
Counsel of Record
COLEMAN, HAWKS & EHLKE, S.C.
SHIRNEYS *for Petitioner*
ATTO 7 South Hamilton Street - Suite 400
Post Office Box 2155
Madison, Wisconsin 53701-2155
(608) 257-0040

Dated: March 13, 2002

172874

COUNSEL PRESS
(800)-3321 • (800) 359-6859

6pp

REASONS FOR GRANTING THE WRIT

A Decision By The Supreme Court Will Resolve Lingering Ambiguity, And Conflict Among The Circuits, Regarding The Proper Construction And Application Of The Notice-Of-Right-To-Sue Provision Of Title VII And Will Clarify The Rights Of Aggrieved Parties Who Have Attorneys Of Record.

Respondent's Brief in Opposition (hereafter referred to as "response brief") does not address head-on the heart of the Petition: the issue of the necessity of serving the claimant's attorney of record when the notice of right to sue is issued. The respondent initiates its argument by citing the pertinent portion of the notice statute, 42 U.S.C. § 2000e-5(f)(1), with emphasis added in bold type. *See* response brief at 1 ("the Commission . . . shall so **notify the person aggrieved and within ninety days after the giving of such notice** a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved. . . .") The emphasis of that certain portion of the statute actually ducks the issue, or at least begs the question presented, in this case. What is meant by the statute's phrases "notify the person aggrieved" and "the giving of such notice," where the aggrieved party is represented by an attorney of record?

Petitioner contends that "such notice" is notice served upon the aggrieved party's attorney of record (instead of or in addition to the client), when there is an attorney of record. Without explicitly saying so, respondent appears to agree with the Seventh Circuit that service upon the attorney of record is "irrelevant." *Id.* at 6.

What is the harm in interpreting the statute to require service upon counsel of record? No one possibly could be hurt by such a rule. The wealth of litigation on the subject of

timeliness demonstrates the high stakes involved for the aggrieved party in meeting the 90-day deadline. The ruling requested by petitioner would protect claimants by ensuring that their lawyers can file timely actions under the statute. It would close the door on the only remaining ambiguity under the statute. It would not be unfair to any party.

None of the court of appeals decisions cited by respondent has facts comparable to the case at bar or raises the issue presented in the instant action. *See Seitzinger v. Reading Hosp. and Medical Center*, 165 F.3d 236 (3d Cir. 1999) (attorney received copy of notice); *Million v. Frank*, 47 F.3d 385 (10th Cir. 1995) (same); *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526 (7th Cir. 1993) (same); *Noe v. Ward*, 754 F.2d 890 (10th Cir. 1985) (same); *Jones v. Madison Service Corp.*, 744 F.2d 1309 (7th Cir. 1984) (same); *Miller v. Runyon*, 77 F.3d 189 (7th Cir. 1996) (no mention of attorney); *Scholar v. Pacific Bell*, 963 F.2d 264 (9th Cir. 1992) (same); *Harvey v. City of New Bern Police Dep't*, 813 F.2d 652 (4th Cir. 1987) (no counsel of record when notice issued); *Espinoza v. Missouri Pacific R.R. Co.*, 754 F.2d 1247 (5th Cir. 1985) (no mention of attorney); *Anooya v. Hilton Hotels Corp.*, 733 F.2d 48 (7th Cir. 1984) (same); *Law v. Hercules, Inc.*, 713 F.2d 691 (11th Cir. 1983) (same).

The respondent concedes that there are circumstances in which failure to file suit within the 90-day period is excused. Response brief at 5. In the primary case respondent cites regarding that point, *Noe v. Ward*, the attorney *did* receive notice, albeit seven days later than the plaintiff. *Id.* at 6. Therefore, the attorney in that case still had 83 days to ensure that the action would be timely filed. Certainly, as this Court's decisions and the decisions in all the circuit courts would dictate, if complainant's counsel also receives the notice — or is the only one to receive the notice, the limitations period ends 90 days from the earliest date of

receipt either by the attorney or the client. However, in the case at bar, petitioner's attorney of record was not served notice and only gained actual notice long after 90 days from the date the notice was issued. He commenced suit within 90 days of first learning the notice had been issued.

In this case, the action should be deemed to be timely commenced. Respondent's argument that petitioner's position "is not supported by the statute," *see* response brief at 10, is incorrect. Construing the statute to require service upon the attorney of record, as well as construing the limitations period to be triggered when the notice is first received either by the attorney or the client, is entirely proper. Most of the circuits deem notice under the statute to be complete upon receipt of the notice, rather than on the date of issuance, despite the fact that the statute literally calls for suit to be commenced "within ninety days after *the giving* of such notice." 42 U.S.C. § 2000e-5(f)(1) (emphasis added). Those decisions deem "the giving" of notice to occur when the notice is actually received, in order to be fair to the aggrieved party. To construe the statute's phrase "the Commission . . . shall . . . notify the person aggrieved" as requiring service upon the aggrieved person's attorney of record, where there is an attorney of record, instead of or in addition to the client, is equally sensible. It is a necessary construction of the statute in order to be fair to the aggrieved party. As the case at bar clearly demonstrates, *effective* notice to the person aggrieved, when the person has an attorney of record, *is* service upon the attorney.

The contention by respondent that petitioner's suggested construction of the statute is an impermissible "attempt to tether his argument to Rule 5(b) [of the Federal Rules of Civil Procedure]," *see* response brief at 11 n.2, is misguided. It was the Supreme Court, itself, that first turned to Fed. R. Civ. P. 5(b) as a guidepost critical to determining the

proper construction and application of the similar notice statute regarding the period of limitations applicable to federal employees, 42 U.S.C. § 2000e-16(c). *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 92-93 (1990). *See* Petition for a Writ of Certiorari (hereafter referred to as "Petition") at 8-9, 13. Likewise, respondent's argument that there is no support in the EEOC's regulations or compliance manual, *see* response brief at 11, is erroneous. The EEOC's actual policies and procedures *do* require service upon the claimant's attorney of record. *See* Petition at 4, 13.

Moreover, any delay in filing the instant action should be excused because no notice was sent to petitioner's counsel, giving rise to the kind of unusual circumstances in which principles of equitable tolling apply. As the Third Circuit succinctly stated, "Under equitable tolling, plaintiffs may sue after the statutory time period for filing a complaint has expired if they have been prevented from filing in a timely manner due to sufficiently inequitable circumstances." *Seitzinger*, 165 F.3d at 240, *citing Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703, 706 (11th Cir. 1998) and *Naton v. Bank of California*, 649 F.2d 691, 696 (9th Cir. 1981). Respondent acknowledges that "the remedy of equitable tolling is reserved for situations in which the claimant has made a good faith error." Response brief at 12. This case falls within that reservation.

The only error that can be assigned to the petitioner is that he relied upon the government agency to act as it should, as was requested by his attorney, and relied upon his attorney to take the actions he was under contract to perform. Under the circumstances, any arguable "disregard of the notice" by the petitioner was warranted. He was misled into believing that he no longer had a duty, himself, to monitor the applicable period of limitations. To rely upon one's attorney of record is not a failure to exercise diligence in preserving one's legal rights.

CONCLUSION

For the foregoing reasons, petitioner requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

DAVID E. LASKER
Counsel of Record
SHNEIDMAN, HAWKS & EHLKE, S.C.
Attorneys for Petitioner
217 South Hamilton Street
Suite 400
Post Office Box 2155
Madison, Wisconsin 53701-2155
(608) 257-0040

Dated: March 13, 2002